

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Curves International, Inc.,

Plaintiff,

vs.

Linda S. Mosbarger,

Defendant

Case Action No. 2007-CV-807-MHT

To: Linda Mosbarger and her counsel of record Connie Morrow and Charles E. Grainger, Jr.,
Grainger Legal Services, Inc., 4220 Carmichael Ct., N., Montgomery, Alabama 36106

**AMENDED MOTION TO ENTER INJUNCTION AS UNOPPOSED OR TO CONTINUE
PRELIMINARY INJUNCTION HEARING**

Curves International, Inc. (“Curves”) hereby moves the Court for an Order entering Preliminary Injunction as unopposed or continuing the Preliminary Injunction hearing currently scheduled for November 14, 2007 at 10:00 a.m. A proposed Order for the injunction has been submitted to the Court. A proposed Order for continuation is attached as Exhibit A.

FACTS

Curves filed this action on September 7, 2007 against Linda Mosbarger, a former Curves franchisee in Deatsville, Alabama, to enforce the post-termination obligations under the Franchise Agreement and for damages for breach of contract. At the time of filing the Complaint, Curves also filed a Motion for Preliminary Injunction. On September 24, 2007, the Court issued an Order (Docket No. 12) setting an evidentiary hearing on November 14, 2007 at 10:00 a.m. The Court’s Order also stated “The parties are to file prehearing briefs by November 9, 2007.” Curves filed extensive briefing with its Motion for Preliminary Injunction, including a Memorandum of Law, Appendix of Cases and supporting Affidavits. Linda Mosbarger failed to

file any responsive memoranda of law, affidavits or other responsive pleadings by the November 9, 2007 deadline set by the Court. Pursuant to Section 6 of the Pretrial Order for this case:

The failure to file a response to any motion – either dispositive or nondispositive – within the time allowed by the Court shall indicate that there is no opposition to the motion.

Scheduling Order (Docket No. 21)

Curves took the deposition of Linda Mosbarger on November 2, 2007 in Montgomery, Alabama. At the time of the deposition, Ms. Mosbarger produced a copy of a “Memorandum of Understanding” purporting to transfer Ms. Mosbarger’s interest in Jordan’s Gym to Truitt K. Johnson. A true and correct copy of the “Memorandum of Understanding” is attached hereto as Exhibit B. Ms. Mosbarger also identified Susan Tinley as the day-to-day manager for Jordan’s Gym. Because Truitt Johnson and Susan Tinley possess knowledge of highly-relevant facts pertaining to the Preliminary Injunction hearing, in the event the Court does not enter the injunction as unopposed, Curves seeks a short continuance in order to depose these individuals.

DISCUSSION

A. The Court Should Enter the Injunction as Unopposed.

This Court’s September 24, 2007 Order clearly states that prehearing briefs were due on November 9, 2007. Other than a one-sentence Answer (Docket No. 16), Defendant has failed to file any pleadings in this case. Pursuant to Section 6 of the Scheduling Order in this matter, Defendant has waived the opportunity to file any responsive briefing, thereby indicating that Defendant has no opposition to Curves’ Motion for Preliminary Injunction. Therefore, Curves respectfully requests that the Court enter the injunction as unopposed in the form submitted to the Court.

B. Alternatively, the Court Should Continue the Evidentiary Hearing.

If the Court declines to enter the injunction as unopposed, a short continuation of the Preliminary Injunction hearing will accomplish several objectives. First, it will give Curves an adequate opportunity to depose Truitt Johnson, the alleged current owner of Jordan's Gym. See attached "Memorandum of Understanding." Curves deems it necessary to depose Mr. Johnson in order to determine when he acquired an interest in Jordan's Gym, the terms of the transaction, the existence of any records relating to the transaction and what level of continuing involvement Ms. Mosbarger has in the ongoing operation of Jordan's Gym.

In addition, Curves deems it necessary to depose Susan Tinley, the current manager of Jordan's Gym. Ms. Mosbarger revealed Ms. Tinley's identity during her deposition on November 2, 2007 and claims that she is the day-to-day manager for Jordan's Gym. Curves seeks an opportunity to depose Ms. Tinley to discern her knowledge of the transaction between Ms. Mosbarger and Truitt Johnson, the composition of the members of Jordan's Gym, the services offered at Jordan's Gym and the extent of Ms. Mosbarger's continuing involvement in the operation of Jordan's Gym. At her deposition on November 2, 2007, Ms. Mosbarger claimed ignorance of the composition of the membership and services offered at Jordan's Gym.

Truitt Johnson and Susan Tinley were not disclosed as individuals with knowledge of facts relevant to these proceedings until the deposition of Linda Mosbarger on November 2, 2007. Because Ms. Tinley and Mr. Johnson are not parties to this action, it will be necessary to subpoena their testimony and records. Curves believes that the testimony from Mr. Johnson and Ms. Tinley will be highly-relevant to the issue of whether the transaction between Ms. Mosbarger and Mr. Johnson was a bona fide sale of the Jordan's Gym business operation, or was merely a sham in an effort to evade Ms. Mosbarger's post-termination noncompete obligations.

In order to preserve judicial resources and present relevant evidence in an orderly manner, Curves seeks a short continuance to gather evidence from these recently disclosed witnesses.

Finally, Curves has made a proposal to Ms. Mosbarger to resolve the injunction portion of this case. As at the time of this Motion, Ms. Mosbarger's Counsel has not replied to Curves' proposal. A short continuance would provide the parties with an opportunity to exhaust efforts to resolve the dispute while at the same time completing discovery from Mr. Johnson and Ms. Tinley in order to present full and complete evidence at the Preliminary Injunction hearing.

CONCLUSION

Based on the foregoing, Curves respectfully requests that the Court enter the injunction requested by Curves as unopposed or continue the hearing on its Motion for Preliminary Injunction up to 30 days in order to obtain the deposition and records of Truitt Johnson and Susan Tinley.

Dated: November 12, 2007

**GRAY, PLANT, MOOTY,
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ATTORNEYS FOR PLAINTIFF

GP:2288498 v1

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PROPOSED ORDER

Upon consideration of Plaintiff's Motion to Continue the hearing on its Motion for Preliminary Injunction, filed November 12, 2007, and for good cause, it is

ORDERED:

That the evidentiary hearing on Plaintiff's Motion for Preliminary Injunction is continued until _____, 2007 at __.m. During this time, Plaintiff shall be allowed to take depositions and seek documents from Truitt Johnson and Susan Tinley.

Done this ____ day of November, 2007.


Myron H. Thompson
United States District Judge

GP:2288199 v1


EXHIBIT A

Memorandum of Understanding

On this the 3rd day of December, 2006, an agreement and memorandum of understanding was reached between the following two individuals, Truitt K. Johnson and Linda S. Lewis, related to their respective businesses, in development, Natural Beauty Garden Center Development, 8617 U. S. Highway 231, Wetumpka, Alabama 36092, and Jordan's Gym, formerly Mike's Gym, 770 Shields Road, Deatsville, Alabama 36022. The parties, Truitt K. Johnson and Linda S. Lewis, each desire to develop future businesses. In this light, Linda S. Lewis, grants, sales and devises her interest in Jordan's Gym to Truitt K. Johnson, for good and valuable consideration. Additionally, Truitt K. Johnson, grants, sales and devises to Linda S. Lewis an 1% ownership in the Natural Beauty Garden Center to be developed in the near future. The principle purpose for this agreement is to finance the parties' joint development company Natural Beauty Garden Center.



TRUITT K. JOHNSON



LINDA S. LEWIS